No. 80-6397

In The

Supreme Court of the United States

October Term, 1980

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SUPREME COURT, U.S.

RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE
OF NEW YORK,

Respondents.

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Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department.

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QUESTIONS PRESENTED FOR REVIEW

1. Shall the rule of Payton vs. New York, 445 U.S., 100 Supreme Court 1371, 63 L. Ed 2d2 639, be applied to Petitioner's case, where petitioner's application for a writ of certiorari on the same grounds was pending in this Court at the time Payton was decided?

2. Where police break into Petitioner's motel room to arrest Petitioner, knowing the occupants to be asleep, without giving notice of their presence and authority and within giving the occupants an opportunity to admit them and where the police rely on the claimed exigencies of the presence of a dog (which was not on the premises) and of the possibility that the occupants might be armed, was Petitioner's arrest unconstitutional?

3. Where Petitioner and his companions went to Florida soon after the murder of a courier, whose job had been held by Petitioner and where the main connection of Petitioner to the crime is that one of his companions had been seen near the courier's bank at least one-half hour before the courier set out for the bank, did the police have probable cause to arrest Petitioner without a warrant.

4. What are the rights of pre-Payton defendants should this Court not apply Payton retroactively?

5. Did the police have exigent circumstances to effect the warrantless arrest of Petitioner in his motel room?

6. Where evidence is seized in violation of the rule of Chimel vs California, may it and the fruits thereof be received in evidence because giving rise only to "faint prejudice" to Petitioner rather than of no effect beyond a reasonable doubt?

7. Where the police thoroughly searched the motel room including the closets, drawers, and chests, and seize every item (but one) belonging to the occupants, have the occupants been subjected to an unconstitutional general search?

8. Where the Court uses truthfulness as a criterion for determining the voluntariness of Petitioner's confession, should the decision that the confession was given voluntarily be reversed?

9. Where the police had the Lincoln automobile under surveillance for four days, having searched the car under a warrant on the first day, may they search the car again on the third day without obtaining a new warrant?

10. Is the second search of the Lincoln improper as part of an unconstitutional general search?

11. May the police seize the Lincoln on the fourth day of surveillance without obtaining a warrant to do so?

12. Should Petitioner's confession and the evidence seized in the foregoing searches and the fruits thereof be suppressed?

13. Should this Court grant the petition notwithstanding it was served more than 60 days after denial of leave to appeal to the Court of Appeals of the State of New York?

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1. This case squarely presents the question whether the rule of Payton vs. New York, 445 U.S. , 100 S. Ct. 1371, 63 L Ed. 2d, should be applied to those cases which were on direct appeal at the time of this Court's opinion. 10

2. This case squarely presents the question of the definition of the constitutional limitations on noticeless entries to effect arrest, and thus raises an important question of Constitutional Law which, to date, has not been, but should be, decided by this Court. 11

3. (a) The decision below demonstrates the continuing reluctance of New York Courts to abandon the reasonable suspicion standard of People vs. Morales, 22 N.Y. 2d 55, reversed sub. nom. Morales vs. N.Y., 396 U.S. 102, and to adopt the requisite standard of probable cause; (b) the absence of probable cause in this case is so egregious as to warrant intervention of this Court. 16

4. Even if Petitioner is not entitled to the benefit of Payton vs. New York, his conviction should be reviewed and reversed. 18

5. The Appellate Division concedes that the motel search violated the rule of Chimel vs. California, 395 U.S. 752, but justifies the search and receipt of the items seized into evidence on the basis of the confession which followed and is a product of the search. Such a ruling violates fundamental rulings of this Court and warrants the corrective review of this Court. 21

6. This Court should review the decision below because the Appellate Division refused to suppress the fruits of a general search in violation of principles long and clearly enunciated by this Court. 22

7. The decision below gives this Court an opportunity to reaffirm a principle so basic that it is rarely stated and oft forgotten: that truthfulness is not an element of voluntariness. 23

8. This Court should review this case because the Courts below have failed to follow the mandates of this Court concerning multiple searches. 25

9. We urge that this Court should review this case because the lower Courts were so enthralled by defendant's confession that the entire proceedings were distorted so that constitutional issues were decided in general in violation of existing principles denying petitioner a fair hearing. 26

10. This Court should grant the writ notwithstanding the application was filed more than 60 days after denial of leave to appeal to the Court of Appeals of the State of New York. 26A

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No.

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Supreme Court of the United States

October Term, 1980

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RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

---

Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department.

The petitioner, Richard Graham, prays that a writ of certiorari issue to review the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, dated and entered on August 13, 1980, which became the final decision of the highest Court of the State by virtue of denial of leave to appeal to the Court of Appeals of the State of New York, rendered on December 26, 1980, by the Hon. Lawrence H. Cooke, Chief Judge of the State of New York. Review is sought to the extent the order of the Appellate Division affirms the judgment of conviction for intentional murder 2d (Penal Law §125.25[1]) and felony murder 2d (Penal Law §125.25[3]).

OPINIONS BELOW

The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (Appendix A) is reported at A.D. 2 , 431 N.Y.S. 2d 209 . The prior opinion of the Appellate Division, Third Judicial Department (Appendix B) is reported at 69 A.D. 2d 544, 419 N.Y.S. 2d 290. The opinion of the Sullivan County Court denying

the suppression motions of Petitioner and Richard Lucas, the motions having been heard together, (Appendix C) is report at 90 Misc 2d 1019, 396 N.Y.S. 2d 966.

JURISDICTION

The order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, was dated and entered on August 13, 1980. Copy of the order is attached hereto as Apperdix D.

Leave to appeal to the Court of Appeals of the State of New York was denied by certificate of the Hon. Lawrence H. Cooke, Chief Judge of the State of New York, dated and mailed December 26, 1980. Copy of the certificate is attached hereto as Appendix E. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## STATUTES INVOLVED

N.Y. Criminal Procedure Law
§120.80(4) (b):

§120.80 Warrant of arrest; when and how executed.

xxxx

4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

xxxx

(b) Endanger the life or safety of the officer or another person;

N.Y. Criminal Procedure Law
§140.15(4):

140.15 Arrest without a warrant: when and how made by police officer.

xxxx

4. In order to effect such an arrest, a police officer may enter premises in which he reasonable believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest.

FACTS

At 8:00 a.m. on October 19. 1975, Petitioner was asleep in his bed in his motel room in Fort Lauderdale, Florida. Immediately thereafter, officers of the Florida Division of Criminal Investigation and the Broward County Sheriff's Office, accompanied by New York State Troopers, broke into his room, with pistols drawn, and arrested the defendant for the murder, kidnapping, and robbery of one Craig Mitton, which allegedly took place on October 13, 1975. (R/A 287, 400, 409-10)*

The police entered defendant's room without any notice of any kind, gaining entry by use of passkey obtained from the motel management. (R/A 341, 400)

The police had no warrant for the arrest of defendant. No warrant had been issued and no Court proceedings had been initiated. A warrant was not issued until the next day. (R/A 429)

Police also arrested the deferdant's "fiancee" who was in the room with him. She was arrested for the same crimes. (See p. 48 infra; R/A 473, T1706)

In the adjoining room, the policy under similar circumstances arrested one Richard Lucas and his girlfriend, Cheryl Kilb. (See page 44, infra; R/A 345-7, 396, 497-9, T1706)

The police had had the motel rooms under constant surveillance since about 11:00 a.m. on the previous day. (R/A 277, 397-8)

During the surveillance the police occupied the rooms on either side of Graham and Lucas. Each police room had a connecting door with one room of Graham or Lucas, whose rooms did not interconnect. The only other egress from the rooms was on to a

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*References are to the record on appeal, which is numbered in two sequences. The suppression hearing pages are numbered starting at R/A 1, while the trial transcript and other documents are numbered starting at R/A-T1.

corridor under surveillance. (R/A 333-5, 392-3, 398, 401) During the first 18 hours of the surveillance petitioner and his three companions had been away from the motel, sightseeing and at entertainment spots. Although the police knew the license plate of their car and the other descriptive information to identify it, no attempt had been made to locate and arrest them. (R/A 336-7, 395-6)

Petitioner and his companions returned to the motel at about 6:00 a.m. on October 19, 1975. (R/A 311). Again, no attempt was made to arrest them, although at least ten officers were present on stakeout.

Police made a conscious decision to wait until they thought the four were asleep before effecting an arrest. (R/A 311-12) Correcting assuming the four to be asleep, the police broke into the rooms at 8:00 a.m. (R/A 345, 498)

The four had traveled to Florida about four days earlier bringing a doberman pinscher with them. They had boarded the dog with a veterinarian several days before the arrest. (R/A 724-5) During the twenty hours of surveillance the police, naturally, had not heard the dog bark nor was the dog with the four when they returned to the motel. The police had no information about the dog's whereabouts since the four had checked into the motel. There was no proof concerning the propensities of the dog, other than its name. One of the arresting officers owned a doberman. Ownership of a doberman in Florida was not illegal in any way. (R/A 343) Immediately on entering the room the police searched for guns. There were no guns in the room. (R/A 345)

The four arrestees were permitted to dress and were taken to the Broward County Sheriff's office, arriving at about 8:30 a.m. (R/A 288-9, 759) All of them, with the exception of Cheryl Kilb, were handcuffed. (R/A 412,474)

After the four had been removed from the motel room, police began a thorough search of the rooms, closets, dressers, and luggage. They thereupon seized every item in both rooms belonging to the arrestees, excluding only the dog cage. (R/A 312-3, 376, 525) A list of the items seized is set forth as Appendix F to this petition at pages 70 to 72, infra.

At about 9:00 a.m. petitioner signed a "rights" form, indicating his willingness to give a statement without an attorney. (Suppression Exhibit 38, R/A 289, 293, T1816)

Petitioner was again questioned at about 10:55 a.m. (R/A 353-5, 447-8) In the interim the evidence seized had been brought into the room in which he was being detained. (R/A 354-5) (The items were used both in questioning petitioner and the two women [R/A 489, 504, 697-8, 760, 765, 818-9, 823].)

During the intervening period, petitioner's request to see his "fiancee" had been denied. (R/A 356, 983-4)

Petitioner started his confession at about 11:00 a.m., finishing it at about 11:45 a.m. (R/A 290-1, 294, 319-23, 353, 446-8) Thereupon, he was permitted to see his "fiancee" and to have lunch with her. And, at about 1:00 p.m., he was brought before a judge in the same building. (R/A 316, 959, suppression exhibit 69-70) (Both women were released later in the day after giving statements [R/A 480-1, 502, 505] The trial court found that both had been arrested; but no charges were lodged against either of them. [See page 48, infra; R/A-T1706])

Petitioner and Lucas had been arrested for the murder, kidnapping and robbery in New York State of one Craig Mitton on October 13, 1975.

The Court found that the police relied on the following facts to establish probable cause:

> Before they arrested the defendant, the police officers knew: that Mitton had been the victim of a robbery and murder; that Lucas and another person had been seen near the bank close to the time Mitton was to arrive; that the defendant had

> recently been fired from the same job Mitton had; that Lucas and the defendant had made plans to leave the area; that although neither Lucas nor the defendant was registered at the Downtowner Motel, Lucas left his car there, rather than at the airport; that the defendant and Lucas were registered in the Florida motel under false addresses; and that Lucas had told a person in the Walden, New York area not to disclose their whereabouts. Thus, the police had done more than merely place Lucas near the bank at about the time of the robbery. Indeed, the police had reason to conclude that Lucas and Graham had fled the area. (Pp. 34-35 , infra.)

On October 17, 1975, the New York State police, acting together with the Newark Police Department, and acting under a search warrant, conducted for "several hours" a thorough search of Lucas's car at the Gateway Downtowner Motel at Newark, New Jersey. (R/A 144) The search was extremely thorough and they seized fingerprints and nearly every loose object in the car, including vacuumings. The list of items seized is set forth as Appendix C , pages 73 to 90 , infra. The seizure was so complete that when they revacuumed the car on October 20, 1975, they obtained no new sweepings. (R/A 117-9)

After the search and seizure on October 17, 1975, the police kept the Lincoln under constant surveillance until they seized it on October 21, 1975, and removed it to the State of New York. (R/A 147-8, 273)

On October 20, 1975, without obtaining a new warrant the police searched the car a second time. New sweepings were done and new fingerprints were taken. These fingerprints established for the first time, on the day after the arrest, a connection between Mittor and the Lincoln. These fingerprints are the only evidence of such a connection. (R/A T835-45)

On the trial, notwithstanding petitioner's confession, a substantial issue developed as to whether or not Lucas and

petitioner in fact killed Mitton. Dr. Milton Gross, then Chief Medical Examiner of the State of Connecticut and now Chief Medical Examiner of the City of New York, testified that Mitton both was shot and died at a time when the People acknowledge that Mitton could not have been killed by petitioner who had already left for New York on their trip to Florida. Dr. Gross testified that the shooting could have occurred no earlier than 1:00 a.m. on October 14, 1975. (R/A - T1203-4) The People's proof indicated that Lucas and Graham arrived at New Windsor, New York between 8:00 p.m. and 9:00 p.m. on October 13, 1975, and left soon thereafter for Newark, New Jersey on their trip to Florida. (R/A T103, T1293-4, T1342)

At his suppression hearing, in addition to Fourth Amendment issues, the petitioner raised the issue of the voluntariness of his confession. In deciding the question of voluntariness, the Trial Court, now affirmed by the Appellate Division, used his belief in the truthfulness of the confession as a factor in determining the voluntariness of the confession. (P/A 822-31)

STAGE AT WHICH ISSUES RAISED

The issue of retroactivity of Payton vs. New York, 445 U.S. , 100 S. Ct. 1371, 63L. Ed. 2d 639, was first raised in the Appellate Division, Third Judicial Department on remand from this Court. (Graham vs. New York, 445 U.S. , 100 S.C. 1371, 63 L. Ed. 2d 639.

Each of the other issues raised herein was first raised on Petitioner's motion in the Sullivan County Court to suppress his confession and the evidence seized in the various searches herein. together with the fruits thereof. Each of the issues, with one exception, was resolved against Petitioner in the decision of the County Court. (Appendix C, p. 37 , infra). The issue of truthfulness as a criterion for voluntariness was resolved against Petitioner by the Sullivan County Court on the record. (Appendix H , p. 91 , infra).

The Appellate Division held against Petitioner on all suppression issues, except that it held assuming that the motel search was conducted in violation of Chimel vs. California, the Petitioner was not prejudiced therety. (Appendix B , p. 37 , infra.)

THE REASONS FOR GRANTING THE WRIT

1. This case squarely presents the question whether the rule of Payton vs. New York, 445 U.S. , 100 S. Ct. 1371, 63 L ED. 2d, should be applied to those cases which were on direct appeal at the time of this Court's opinion.

At the time this Court decided Payton, several cases raising the same issue of the permissibility of warrantless home searches without exigent circumstances were pending in this Court. This Court did not then decide whether to apply Payton to the cases then pending. Rather it remanded the cases to the state courts for reconsideration in light of Payton. (Brown vs. Florida, U.S. , 64 L. Ed. 2d 254, 100 S. Ct. 1826; Bush vs. Florida, U.S. , 64 L. Ed. 2d 255, 100 S. Ct. 1826; Dunagan vs. Illinois, 64 L. Ed. 2d 257 100 S. Ct. 1829; Gayle vs. New York, 64 L. Ed. 2d 257, 100 S. Ct. 1829; Gonzalez vs. New York, 64 L. Ed. 2d 253, 100 S. Ct. 1824; Gordon vs. New York 64 L. Ed. 2d 255, 100 S. Ct. 1827; Vidal vs. New York, 64 L. Ed. 2d 255, 100 S. Ct. 1826.)

On reconsideration, the Appellate Division declined to apply the rule of Payton to Petitioner's case.* Petitioner had raised the unconstitutionality of his warrantless, exigentless arrest in his room at the earliest moment and asserted it throughout a lengthy suppression hearing, trial, and appeal.

Apart from the question of general retroactivity, this case raises the question whether a defendant who has perceived the unconstitutionality of his position and argued at all levels should be denied relief solely by luck of the draw.

The issue of the application of Payton to cases pending at

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*The Appellate Divisionsfor the First and Second Departments have reached the same conclusion: People vs Benitez, 76 A.D.2d, 196, 199, N. 2, 430 N.Y.S.2d 287, 289, N.2: People vs Whitaker, ____A.D.2d ____, 433 N.Y.S.2d 849; People vs Gonzalez, ____ A.D.2d ____, ____N.Y.S.2d ____ (Second Department, 2/23/81); People vs Gordon, ____A.D.2d ____, ____N.Y.S.2d ____ (Second Department, 2/23/81).

the time of its decision in this Court falls within the guidelines established by Rule 17.1 (c) of this Court for the granting of writs of certiorari. In a sense it is "unfinished business" of Payton, itself. The broader question of the general retroactivity of Payton also fits the criterion. These questions are important questions of federal law which have not been, but should be settled by this Court. The number of defendants affected in the States who permitted warrantless, exigentless arrests prior to Payton makes these general questions which should be resolved by this Court.

> 2. This case squarely presents the question of the definition of the constitutional limitations on noticeless entries to effect arrest, and thus raises an important question of Constitutional Law which, to date, has not been, but should be, decided by this Court.

The Appellate Division held below that the noticeless entry of the police into the bedroom of the sleeping petitioner was not illegal because of the existence of exigent circumstances.* (See page 35 , infra.)

The Court relied on the possible existence of the doberman pinscher and of guns in the room as constituting the exigent circumstances. Its reliance in that regard is contrary to an almost unbroken line of cases, discussed below, that the possibility of the arrestee being armed negates the justification for a noticeless, as opposed to a warrantless, arrest.

Furthermore, the facts relied on by the Appellate Division do not warrant a finding of exigent circumstances.

In Ker vs California, 374 U.S. 23, Mr. Justice Clark wrote, for four members of the Court, that "the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the legality of an accompanying search." (Ker vs. California, 374 U.S. 23, 38.)

Notwithstanding the recurrence of the issue, this Court has

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*Exigent circumstances were found only for the noticeless entry; exigent circumstances were not found to justify the warrantless entry.

yet to hold that a constitutional right exists, to define its limits, or to define the exceptions, if any, which would justify a noticeless entry. This situation has arisen either because previously complained of noticeless entires have been struck down as not complying with the relevant local statute or have been upheld as both legal and constitutional. (Ker vs. California, supra; Sabbath vs. United States, 357 U.S. 301; see also, Rodriquez vs. Butler, 536 F2d 982 (2d Cir).)

The existence of a federal, constitutional rights is a recurring problem which has so far been avoided in the lower Courts on the same basis as in this Court: statutory illegality or a finding both of legality and constitutionality. (See, for example, Rodriquez vs. Butler, supra; United States vs. Sokolow, 450 F2d 324 (5th Cir.); United States vs. Chapman; 384 F. Supp. 1232 (S.D. Fla); United States vs. Sims, 231 F. Supp. 251 (D. Md.); People vs. Floyd 26 N.Y. 2d 558, 312 N.Y.S. 2d 193).

The lower Courts have tended to assume the existence of a federally protected right against noticeless entry or to point out that its existence remains in question. (See, for example, Rodriquez vs. Butler, supra, 536 F2d at 985; United States vs. Sims, supra, 231 F. Supp. at 255; People vs. Floyd, supra, 26 N.Y. 2d at 563, 312 N.Y.S. 2d at 1956.)

We respectfully suggest that the right against noticeless entry is too fundamental to be left any longer to conjecture. This Court has noted that:

> The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given gruding application.... Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. (Miller vs. United States, supra, 357 U.S. at 313.)

Such deeply "embedded", "traditional fair procedural requirements", as notice of authority and of purposes should not remain consigned to constitutional limbo. (Miller United States, supra, 357,U.S. at 313).

This case is especially appropriate for addressing the issue because the Appellate Division asserted as exigent circumstances the very circumstances that have traditionally called for a heightened awareness of the need to give notice: the possibility that the arrestees might be armed.

This Court, the Court of Appeals of New York (under whose law the case was decided), and the Supreme Court of Florida (in whose state the entries were made) have all held expressed the view that the traditional requirement of notice is intended to avoid violence particularly where the arestee is armed. Time and again, this Court and others have cited with approval the concurrence of Mr. Justice Jackson:

> I am the less reluctant to reach this conclusion because the method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave trouble if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crimebeset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom windown and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcing officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing the jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to law enforcement agencies themselves. (McDonald vs. United States, concurring opn. 335 U.S. 451, 460-1; citeu at Sabbath vs. United States, supra, 391 U.S. at 589. Miller vs. United States, supra, 357 U.S. at 313, w. 12; People vs. Floyd, supra, 26 N.Y. 2d at 562, 312 N.Y.S. 2d at 195, note: Koptyra vs. State, 172 (So 2d 628, 631 (Fla).).

The fact relied on by the Appellate Division that the officers armed themselves against the danger ("In fact, one of the arresting officers had wrapped a towel around his arm prior to the entry for protection against the anticipated attack by this animal. [P. 14, infra.]), does not vitiate the essential nature of the traditional rule in this regard. the Appellate Division ignored even the New York formulation of the common-law rule:

> Nor does the circumstances that the arresting officers drew their guns before entering defendant's room prove anything, especially since they were engaging in the extra hazardous act of entering his room by stealth without notice. (People vs. Floyd, supra, 26 N.Y. 2d at 563, 312 N.Y.S. 2d at 195.)

The requirement of notice assumes the possibility of armed defense by the unsuspecting arrestee. It is just this possibility which the requirement seeks to avoid. The requirement of notice gives the armed arrestee the opportunity to surrender peaceably.

New York Criminal Procedure Law §§120.80 and 140.15 are the embodiment of the common law. (People vs. Floyd, supra, 26 N.Y. 2d at 562, 312 N.Y.S. 2d at 194-5). As such the exceptions in C.P.L. §§120.80 (4) and 140.15(4) are not intended to do away with the notice requirement as historically developed, but only to cover situations where the police are under attack or threatened with attack.

In any event, it is appropriate for this Court, should it find a constitutional right of notice to exist, to determine also the limits of that right. This Court should determine if exception to the right, by way of definition of exigent circumstances, may destroy the right itself.

We believe that the argument against such destruction by exception is fully made by the United States District Court for District of Maryland dealing with circumstances strikingly similar to these:

> Lest this Court be thought to have permitted a legalism to prevail over common sense and to have subjected arresting authorities to an unnecessary risk to their lives and safety in the performance of their duty, it is well to restate what is here decided....an arresting officer may not break into a home (here, a hotel room) without prior demand for entry, statement of purpose and refusal of admittance solely on the ground that to demand entry and give notice would result in increased risk of bodily harm to him. This is decided because repeated deliberate decisions over a course of more than three hundred years have concluded that when there is a conflict between these two considerations, the right to privacy in one's own home must prevail over society's interest in punishing the guilty. Here a conflict between these considerations could well have been avoided. Defendant's whereabouts were known to the FBI. No valid reason appears why defendant could not have been arrested going into his hotel room, coming out of his hotel room in a corridor, public room or the elevator of the hotel or outside the hotel. By choosing to make the arrest in the legal equivalent of defendant's home the agents subjected themselves to the necessity of giving notice. Their failure to give notice rendered the arrest illegal. (United States vs. Sims, 231 F. Supp. supra, at 257-8).

Finally this Court, if necessary, should exercise the powers asserted by for it by Mr. Justice Clark "to determine whether, notwithstanding its legality under State law, the manner of entering the house...offend[ed] federal Constitutional standards of reasonableness..." (Ker vs. California, supra 374 U.S. at 38.) May the police reasonably rely on their "fears" of a dog who has not barked for 18 hours? May they reasonably rely on their "fears" that an arrestee is armed in the absence of any objective proof that he is or that he has been at any reasonably recent time, if ever?

We respectfully suggest that definition of the constitutional right of notice before entry is a matter that fully warrants the attention of this Court at this time.

3. (a) The decision below demonstrates the continuing reluctance of New York Courts to abandon the reasonable suspicion standard of People vs. Morales, 22 N.Y. 2d 55, reversed sub. nom. Morales vs. N.Y., 396 U.S. 102, and to adopt the requisite standard of probable cause; (b) the absence of probable cause in this case is so egregious as to warrant intervention of this Court.

The Appellate Division stated the facts upon which it based a finding of probable cause:

> Before they arrested the defendant, the police officers knew: that Mitton had been the victim of a robbery and murder; that Lucas and another person had been seen near the bank close to the time Mitton was to arrive; that the defendant had recently been fired from the same job Mitton had; that Lucas and the defendant had made plans to leave the area; that although neither Lucas nor the defendant was registered at the Downtowner Motel, Lucas left his car there, rather than at the airport; that the defendant and Lucas were registered in the Florida motel under false addresses; and that Lucas had told a person in the Walden, New York area not to disclose their whereabouts. Thus, the police had done more than merely place Lucas near the bank at about the time of the robbery. Indeed, the police had rason to conclude that Lucas and Graham had fled the area. (P. 30-1, infra.)*

It is respectfully submitted that even as to Lucas these facts give rise only to a suspicion. As to petitioner they surely give nothing more.

The Appellate Division reached its conclusion without citation of authority (except as to flights) and without analyzing the facts.

Its decision and the refusal of the New York Court of Appeals to hear the case represent a continuing tendency on the part of the New York Courts to apply the reasonable suspicion standard enunciated in People vs. Morales, 22 N.Y. 2d 55, reversed sub nom, Morales vs. New York, 396 U.S. 102, notwithstanding this Court's decision in Dunaway vs. State of New York, U.S. 99, S. Ct. 2248,

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*The finding that Lucas gave a false address is totally unsupported in the record. He gave his correct address, not only at the motel, but at the car rental agencies and at Western Union. (R/A 284, 394; Suppression Ex's 49, 50, 54.)

60 L Ed 2d 824. (Cf. People vs. Bryant, 71 A.D. 2d 564 , 418 N.Y.S. 2d 621 and People vs. Vese, 100 Misc 2d 8 , 417 N.Y.S. 2d 1015.)

The New York Courts resisted the probable cause standard during the ten years between Morales vs. New York and Dunaway vs State of New York. (See for example, People vs. Morales, 42 N.Y. N.Y. 2d, 129, 135, cert. den. 434 U.S. 1018; People vs. Wise, 46 N.Y. 2d 321; People vs. Liberty, 67 AD2d 776 (3rd Dept.); People vs. Boyer, 65 A.D. 2d 840 (3rd Dept.).)

The decision below represents a continuing application of the Morales reasonableness standard without invoking it by name. Particularly, it continues the use of facts placing the arrestee near the scene of the crime as justification for the police conduct. (See People vs. Morales, supra, 42 N.Y. 2d at 134-5; People vs. Wise, 46 N.Y. 2d 321, 330.)

Petitioner's sole alleged connection with the crime itself is that his friend Lucas was seen at the bank, which Mitton may or may not have arrived at, at least 40 minutes before Mitton would have arrived there. Peculiarly enough, the New York Court of Appeals in Morales recognized that placing "the defendant in the vicinity of the crime" even "at the time of the murder" does not constitute probable cause (People vs. Morales, supra, 42 N.Y. 2d at 135.)

A finding of probable cause in this case so violates the standards ennunciated by this Court to warrant granting this petition, even if the decision below is not part of a pattern of reluctance.

The facts at best warranted this police in seeking to question Petitioner, certainly not in arresting him.

Viewed objectively and without hindsight there is nothing in

the facts which justifies a finding of probable cause. (Beck vs. Ohio, 379 U.S. 89, 91; Rios vs. United States 364 U.S. 253, 261-2)

Lucas's presence near the bank, even when combined with the other meager facts, did not give probable cause to believe he had later waylaid Mitton, transported him 35 miles, robbed him and murdered him. (United States vs. DiRe, 332 U.S. 581; People vs. Morales, supra, 42 N.Y. 2d at 135.)

Nor can petitioner's alleged "flight" be considered as affording probable cause. Viewed objectively, the trip to Florida was equally nothing more than a vacation jaunt by two married men with women other than their wives.

Petitioner's arrest was based solely on suspicion based on conduct that is equally innocent as guilty, and at worst equivocal. Such conduct does not give rise to probable cause. (Henry vs. United States, 361 U.S. 98; Taylor vs. United States, 286 U.S. 1).

The intrusion into petitioner's life was of the highest nature: he was placed under arrest and the arrest was made by warrantless entry into his locked bedroom while he was known to be sleeping. Such an intrusion requires the highest predicate for police intrusion. (Terry vs. Ohio, 392 U.S. 1; see also Stoner vs. California, 376 U.S. 483; McDonald vs. United States, 335 U.S. 451; United States vs. Jeffers, 342 U.S. 48, Johnson vs. United States, 333 U.S. 10.)

4. Even if Petitioner is not entitled to the benefit of Payton vs. New York, his conviction should be reviewed and reversed.

Assuming that Petitioner and other prisoners in his possession as pre-Payton defendants are not entitled to the benefit of the Payton rule, this Court should determine the extent of their rights under pre-Paytor law.

a) People vs. Payton and Riddick called for a heightened identification not found in this case.

In Payton, "two eyewitnesses to the crime -- both of whom had known the defendant -- identified him to the police as the killer. One of the witnesses also furnished the defendant's address." (People vs. Payton and Riddick, supra, 45 N.Y. 2d at 305.)

In Riddick, "the victims had identified defendant from a photograph as the perpetrator of the robberies." (People vs. Payton and Riddick, supra, 45 N.Y. 2d at 307.)

No such direct, eyewitness identification is present here. Petitioner was arrested on weak circumstantial evidence which it constitutes probable cause barely does so. The case gives this Court the opportunity to delineate the nature of the proof of identify necessary to justify a pre-Payton arrest.

b) People vs. Payton and Riddick did not justify all warrantless home arrests. The Court of Appeals itself pointed out "the especially alarming quality of night time entries." (People vs. Payton and Riddick, supra, 45 N.Y. 2d at 311.)

This case gives this Court the opportunity to delineate the circumstances under which a pre-Payton warrantless arrest could be made, particularly in regard to an arrest which "gives the appearance of having been calculated to cause surprise, fright, and confusion" and succeeded in doing so. (Brown vs. Illinois, 422 U.S. 590, 605.)

c) This case gives this Court the opportunity to determine the effect of delay and the general passage of time on both Payton and pre-Payton arrests.

The arrests were made four days after the investigation focused on Graham and Lucas; two days after the police determined Graham and Lucas had gone to Fort Lauderdale; 32

hours after the New York Police arrived in Florida; at least 20 hours after the police located the motel room; and two hours after the four suspects returned to the motel and went to sleep. The time lapse alone belies exigency. The recent words of Chief Justice Berger apply almost verbatim to this case:

> ... It may be useful to note that the factual setting of this case provides what seem to me, a classic illustration of the dividing line between an impermissible, warrantless entry and one permissible under the "exigent circumstance" except to the Fourth Amendment warrant requirement.
>
> ... the IRS agents assigned to the investigation of the fugitive Norman's tax liability place the premises under 24-hour surveillance. One night during the course of this surveillance, the agents observed cartons and other materials being removed from the premises by persons unknown to them. Against the background facts, such surreptitious nighttime activity constituted an exigent circumstance that would have justified an immediate seizure of the materials being moved in order to protect the interest of the United States. This is especially so since here the premises were controlled by the alter ego of an indiviudal who was not a delinquent taxpayer, but who was, at the time, a fugitive from justice. Rather than acting immediately, however, the agents chose to wait for approximately a day and a half or two days before making their entry. I agree with the conclusion that there were no exigent circumstances or these facts; however, the Court holds no more than that the agents' delay after observing these highly suspicious events makes that exception to the warrant requirement unavailable to them. By failing to act at once, the exigency was dissipated .... (G.M. Leasing Corp. vs. United States, U.S. , 97 S. Ct. 619, 663).

Any justification for a warrantless arrest would surely have been lost by the leisurely pace the police set themselves, which gave more than adequate time to obtain a warrant.

d) Should this Court decide not to apply Payton retroactive y, it should not leave pre-Payton defendants in a constitutional limbo. It should decide those constitutional questions which are

left open by Payton. This case is an especially appropriate vehicle for such determinations since the issues are raised so clearly.

> 5. The Appellate Division concedes that the motel search violated the rule of Chimel vs. California, 395 U.S. 752, but justifies the search and receipt of the items seized into evidence on the basis of the confession which followed and is a product of the search. Such a ruling violates fundamental rulings of this Court and warrants the corrective review of this Court.

The Appellate Division assumes that the motel search was improper but holds that "in light of the overwhelming case against him once his confession had been admitted, and the faint prejudicial impact of the fruits of the improper search, the error must be considered harmless (see People v. Crimmins, 36 N.Y. 2d 230, 240-241...)" (P. 35 , infra)

(Interestingly enough, this is an incorrect statement of the New York rule. By citing to Crimmins at 36 N.Y. 2d at 240-241, the Appellate Division applied the Crimmins rules for non-constitutional error rule which requires reversal unless "there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt". (People vs. Crimmins, supra, 36 N.Y. 2d at 237.).)

There was a serious trial issue, especially in light of Dr. Gross's testimony that the shooting took place after 1:00 a.m. on October 14, 1975, when petitioner was already in New Jersey. Surely, the safe deposit keys and other evidence seized in the motel search contributed to the jury's rejection of Dr. Gross's testimony. Other evidence such as the safe deposit box and the money, were obtained from leads given by the illegally seized evidence, (Nardone vs. United States, 308 U.S. 338.) The receipt of this evidence was not harmless beyond a

reasonable doubt and Appellate Division did not even find it to be so. (Chapman vs. California, 386 U.S. 18, 21-4; Fahy vs. Connecticut, 375 U.S. 85, 91-2)

The Appellate Division justified the search on the basis of the confession which was, at least in part, the product of the search. The Court may not so support an unconstitutional search. The justifying confession is itself the poisonous fruit of the tree. (Wong Sun vs. United States, 371 U.S. 471)

Such misconceptions justify review by this Court not only to correct the situation in this case but to remind the Courts that their view of a defendant's guilt cannot be determinative of the constitutional issues before them.

> 6. This Court should review the decision below because the Appellate Division refused to suppress the fruits of a general search in violation of principles long and clearly enunciated by this Court.

The police seized everything in the two rooms except the dog cage. They searched drawers, suitcases, closets, and medicine cabinets.

Whether viewed as a proper warrantless search or as a search incident to an arrest, the search was unconstitutional.

General searches, with or without a warrant, are unconstitutional:

> General searches have long been deemed to violate fundamental rights. It is plaint that the Amendment forbids them. (Marron vs. United States, 275 US 192, 195; see also Stanford vs. Texas 379 US 476)

Since a warrantless search is an exception to the Fourth Amendment warrant requirement, no greater rights are acquired by the policy in a warrantless search. Warrantless, general searches are equally abhorrent as general warrants conducted under warrants:

> General or exploratory searches are condemned even when they are incident to a lawful arrest. (Amador-Gonzalez vs. United States, 391 F2d 308, 313. See also United States vs. Bravo, 403 F. Supp. 297, 302-3)

Indeed, limitation of searches is one of the two main reasons for requiring a warrant in the first place. (Coolidge vs. New Hampshire, 403 US 443, 467.)

The seizures in this case fall clearly within those prohibited by this Court in Kremen vs. United States, 353 U.S. 346.

Both the police and the Courts appear to require reminder by this Court that the right to search and seize is a delimited one.

> 7. The decision below gives this Court an opportunity to reaffirm a principle so basic that it is rarely stated and oft forgotten: that truthfulness is not an element of voluntariness.

The County Court considered the truthfulness of the confession as a factor in his determination of voluntariness:

> THE COURT: It appears to me the truth and accuracy of a statement would have a bearing upon its voluntariness. (R/A 732)
>
> THE COURT: I think the truthfulness and accuracy of his confession has a bearing upon its voluntariness. It certainly has to me. (R/A 733)
>
> THE COURT: It's a matter of common experience and knowledge, Mr. Zager. If a man's words are twisted, and the details being given of some event, and if it's being done under some compulsion, that the might give details which are altogether different from the truth. If he is, on the other hand, making a voluntary statement of his own free will and without any violation of any of his constitutional rights, and in the desire to cooperate, there is a likelihood his statement would be more truthful. I think that the accuracy or truthfulness of a statement that is given has a bearing upon the issue as to whether or not it was voluntarily given. That is the only reason I'm taking it. (R/A 739)
>
> THE COURT: I will overrule the objection on two grounds. ...secondly, it relates to the truthfulness of the confession. I believe it would have some bearing upon the issue which I have to decide, which is its voluntariness. (R/A 823)

> THE COURT: The Court is saying, and I'm saying and I think I have said it very clearly, that the truthfulness of the confession would have a bearing. It's not determination, not dispositive of the issue, but would have a relationship or bearing upon the question that the Court has to determine. (R/A 826)

These rulings, as affirmed, violate fundamental principles of the privilege against self-incrimination. They put defendant to the test, of proving his confession to be false, when that is not properly a factor.

This Court has clearly rejected the criterion of truthfulness, yet the trial Court repeatedly asserted truthfulness as a factor in his determination.

Fundamentally, the privilege against self-incrimination assumes the truthfulness of the confession, but asserts the society's higher value in freedome from coercion:

> Our decisions under that Amendment [14th] have made clear that convictions following the admission into evidence of confessions which are involuntary...cannot stand. This is so not because such confessions are likely to be untrue but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law... (Rogers vs. Richmond, 365 U.S. 534, 540-1.)

> From a fair reading of these expressions, we cannot but conclude that the question whether Roger's confessions were admissable into evidence was answered by reference to a legal standard which took into account the circumstances of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the Trial Judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined -- a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth. (Rogers vs. Richmond, supra, 365 U.S. at 543-4) (emphasis supplied)

The use of the incorrect truthfulness standard should have resulted in reversal of the finding that the confession was voluntary:

> We are barred from speculating--it would be an irrational process -- about the weight attributed to the impermissible consideration of truth and falsity which, entering into the Connecticut trial court's deliberations concerning the admissability of the confessions, may will have distorted by putting in improper perspective, even its findings of historical fact. Any consideration of this "reliability" element was constitutionally precluded, precisely because the force which it carried with the trial judge cannot be known, (Rogers vs. Richmond, supra, 545) (Emphasis supplied)

In light of the fundamental misconception of the privilege by the Courts below, it is proper that the Court reaffirm the irrelevance of truthfulness to a determination of voluntariness.

> 8. This Court should review this case because the Courts below have failed to follow the mandates of this Court concerning multiple searches.

The Courts below did not resolve the question of whether the second search of the Lincoln on October 20, 1975, was warrantless or not. In either event the search was conducted in violation of the mandates of this Court.

The October 20, 1975, search cannot be justified under the warrant of October 17, 1975, which had been fully and thoroughly executed.

A search warrant authorizes only one search; it does not allow the police two bites of the apple. The Fourth Amendman prohibits "a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." (Berger vs. New York, 388 U.S. 41, 59.)

Beyond that statement, the rule appears to have been developed in the lower courts. (Mellet & Nichols Brewing Co. vs. United States, 296 Fed. 765, 768-9; United States vs. American Brewing Co., 296 Fed. 772, 777-8; Coburn vs. State, 78 Okl. Cr. 362, 148, P. 2d 483, 494; Duncan vs. State, 11 Okl. Cr. 217, 144 P. 629, 632; State vs. Moran, 103 W. Va. 753, 138 S.E. 366, 368; State vs. Pina, 383 p. 2d 167, 168-9; McDaniel vs. State, 197 Ind. 179, 150 N.E. 50;

State vs. Parsons, 83 N.J. Super. 430, 200 A2d 340, 350.)

Viewed as warrantless, the search of October 20, 1975, was equally unconstitutional. (Mincey vs. Arizona, U.S. , 98 S. Ct. 2408; Coolidge vs. New Hampshire, 403 U.S. 443, 458-64; of Caldwell vs. Lewis, 417 U.S. 583).

This case especially gives the Court the opportunity to distinguish between surveillance and seizure of a motor vehicle.

The police had the car under surveillance from October 17 to October 21. They searched the car on October 17 and on October 20, seizing and carrying away most of the evidence.

On October 21, without a new warrant, they seized the car itself. We believe that it is proper for this Court to determine if such a seizure, independent of the searches, is proper.

9. We urge that this Court should review this case because the lower Courts were so enthralled by defendant's confession that the entire proceedings were distorted so that constitutional issues were decided in general in violation of existing principles denying petitioner a fair hearing.

It is respectfully suggested that the constitutional issues herein were resolved not on their merit but on the strength of the Court's overwhelming belief in petitioner's guilt, thus denying petitioner a fair hearing on the issues.

This Court, both to protect the rights of petitioner and to remind Courts of the independence of guilt and denial of constitutional rights, should review this case. Petitioner should be entitled to have constitutional issues decided dispassionately on constitutional principles.

10. This Court should grant the writ notwithstanding the application was filed more than 60 days after denial of leave to appeal to the Court of Appeals of the State of New York.

This petition is filed more than 60 days after leave to appeal to the Court of Appeals of the State of New York was denied. Therefore, it was not timely under this Court's rules.

As appears from the annexed affidavit of Stephen L. Oppenheim, Exhibit I, p. 92, infra, the delay was solely the result of error by assigned counsel.

Since the defect is not jurisdictional, since the petition raises substantial issues, and since the delay is solely the result of error by assigned counsel, it is respectfully prayed that this Court grant the writ notwithstanding the tardiness of this application.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: March 23, 1981

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